No. 79-757

In the Supreme Court of the United States

OCTOBER TERM, 1979

CUMMINS ENGINE COMPANY, INC., PETITIONER

v.

ALAN CARNEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 602 F. 2d 763. The opinion of the district court (Pet. App. A8-A14) is reported at 84 Lab. Cas. para. 10,856, and 99 LRRM 2683.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1979. A petition for rehearing was denied on August 16, 1979. The petition for a writ of certiorari was filed on November 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner violated the Veterans' Reemployment Rights Act, 38 U.S.C. 2021(b)(3), in refusing to permit respondent to make up overtime opportunities he had missed while serving on military reserve duty.

2. Whether an order pursuant to the Veterans' Reemployment Rights Act compensating a reservist for denial of his rights under that statute is an unconstitutional taking without just compensation.

STATUTES INVOLVED

The Veterans' Reemployment Rights Act provides in pertinent part:

38 U.S.C. 2021(b)(3)

Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

38 U.S.C. 2024(d)

Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident

to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.* * *

STATEMENT

At all times relevant to this action, respondent was a member of the Indiana National Guard and was employed by petitioner under the terms of a collective bargaining agreement with the Diesel Workers' Union (Pet. App. A2-A3). This agreement provided that overtime opportunities would be distributed equally among employees available to perform the work. Any errors in assigning the work, either conscious or inadvertent, were to be corrected within 30 days of being brought to petitioner's attention (*id.* at A2). If the error was not corrected within 30 days, or if the affected employee transferred to another department before making up all of the overtime to which he was entitled, petitioner was bound to pay the employee for the missed overtime (*ibid.*). If an employee refused proffered overtime work or was absent (even for military obligations) when the opportunity arose, he was charged in the company records for these purposes as if he had worked the overtime (*ibid.*).

Petitioner was notified by the Department of Labor in July 1975 that certain features of this system violated the Veterans' Reemployment Rights Act, 38 U.S.C. 2021 *et seq.* (Pet. App. A2). In response to this notice, petitioner's officers and union representatives agreed to alter the procedure so that reservists would not be charged with missed overtime opportunities when they were absent for military reasons (*id.* at A2-A3). However, the modification also provided that petitioner

would not be liable to pay reservists for missed opportunities that were not offered within 30 days or not made up before transfer to another department (*id.* at A3).

While attending summer camp training with the National Guard in July 1975, respondent missed the opportunity to work 11 overtime hours (Pet. App. A3). He was allowed to make up three of these hours but was transferred to another department on September 2, 1975, before being permitted to make up the remaining eight hours (*id.* at A3-A4). Petitioner refused to pay respondent for the lost overtime or to allow him an opportunity to make up the time.

Respondent brought suit in the United States District Court for the Southern District of Indiana to compel petitioner to permit him to make up the missed overtime.[1] On cross-motions for summary judgment, the district court ruled in respondent's favor and ordered petitioner either to permit respondent to work eight hours of overtime or to pay him compensation for that time (Pet. App. A8-A15). The court of appeals affirmed (*id.* at A1-A7).

ARGUMENT

1. Petitioner concedes that the opportunity for overtime work is an "incident or advantage of employment" within the meaning of 38 U.S.C. 2021(b)(3) (Pet. App. A4), but it contends (Pet. 7-10) that application of Section 2021(b)(3) to this case conflicts with prior decisions of this Court. This contention is erroneous because, as petitioner notes (Pet. 11), this Court has

[1]Pursuant to 38 U.S.C. 2022, respondent is represented in this action by the Department of Justice.

never considered the scope of Section 2021(b)(3). We submit that there is no reason for the Court to do so here. There is no conflict in the circuits concerning the issue presented in this case,[2] and the court of appeals correctly applied Section 2021(b)(3).

Petitioner contends that Section 2024(d) should apply here to the exclusion of Section 2021(b)(3). As the court of appeals observed (Pet. App. A5), however, the history of the legislation that added Section 2021(b)(3) clearly indicates that the section was enacted because Congress was dissatisfied with the scope of the protection provided by Section 2024(d), see H.R. Rep. No. 1303, 89th Cong., 2d Sess. (1968) (reprinted at Pet. App. A67-A80), and wanted to "strengthen" the existing protections (Pet. App. A67). The House Report indicates the congressional concern that reservists were suffering from discriminatory employment practices, in spite of the existence of Section 2024(d) (Pet. App. A70). Accordingly, Section 2021(b)(3) was enacted to protect reservists from employment practices that affect them on a day-to-day basis. Contrary to petitioner's claim (Pet. 9) that Section 2021(b)(3) was meant to protect reservists only "between their reserve absences," the Report states unequivocally that the section was designed "to enable reservists and guardsmen who *leave* their jobs to perform training in the Armed Forces to retain their employment and to enjoy *all* of the employment opportunities and benefits accorded their co-workers who do not participate in the Reserve program" (Pet. App. A70; emphasis added).

[2]One of the two district court cases cited by petitioner (Pet. 11 n.7) as in conflict with the decision below has recently been reversed on appeal. *West* v. *Safeway Stores, Inc.*, 84 Lab. Cas. para. 10,905 (N.D. Tex. 1978), rev'd, 609 F. 2d 147 (5th Cir. 1980).

Thus, Section 2021(b)(3) plainly was intended to add to the protections of Section 2024(d) and to ensure that a reservist would not be disadvantaged relative to his co-workers in his daily work life, simply because he was absent from work at summer training. Section 2024(d) deals primarily with reinstatement of reservists; for example, it guarantees a reservist the right to take a leave of absence and return to his job while still having his time spent in military training count for seniority purposes. See, *e.g.*, *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977). Accordingly, the courts have generally held that Section 2021(b)(3) ensures that a reservist, as a result of fulfilling his military obligations, may not be deprived of opportunities for benefits that his co-workers receive. Such benefits include overtime opportunities (*Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975); but see *Breeding* v. *TRW, Inc., Ross Gear Division*, 477 F. Supp. 1177 (M.D. Tenn. 1979), pending on appeal, No. 79-1629 (6th Cir.)), the opportunity to work a 40-hour week (*West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (5th Cir. 1980); *Monroe* v. *Standard Oil Co.*, 446 F. Supp. 616 (N.D. Ohio 1978), pending on appeal, No. 78-3233 (6th Cir.)), and holiday pay (*Kidder* v. *Eastern Air Lines, Inc.*, 469 F. Supp. 1060 (S.D. Fla. 1978)); *Hanning* v. *Kaiser Aluminum and Chemical Corp.*, 82 Lab. Cas. para. 10,070 (E.D. La. 1977)). See also *Carlson* v. *New Hampshire Dept. of Safety*, No. 79-1262 (1st Cir. Nov. 30, 1979).[3]

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[3]Petitioner contends (Pet. 11-12) that the decision now before this Court, combined with the decision in *Monroe* v. *Standard Oil Co.*, *supra*, will cost employers $700 million per year because reservists will be entitled to be paid for the two weeks spent in summer reserve training. This contention is without foundation. In *Monroe*, the court specifically negated the suggestion that a reservist should be paid for his two weeks spent in summer training. 446 F. Supp. at 620. In fact, compliance with the Act here costs an employer nothing. Congress has simply required that employers make special efforts to accommodate reservists so that "their economic well being is disrupted to the minimum extent possible" (Pet. App. A71). Congress plainly recognized that not all such disruption is avoidable.

2. Petitioner's contention (Pet. 12-14) that Section 2021(b)(3), as construed by the courts below, constitutes an unconstitutional taking of property without just compensation is also insubstantial. As the court of appeals pointed out (Pet. App. A6-A7), petitioner is not compelled by the district court's order to pay respondent for not working; it was given the option of assigning respondent overtime work to make up his lost opportunities. In any event, a provision requiring an employer to compensate an employee for violation of his rights does not constitute a taking.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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